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SUPREME COURT, U.S.

In The

Supreme Court of the United States

Term, 1981

No. 80-6714

James Freeman, Petitioner

vs.

Joe Oliver and the State of Alabama, Respondents

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

Pro se

In The

Supreme Court Of The United States

Term, 1981

No.
C.C. No. 80-8607
D.C. No. CV80-A-0892-S

James Freeman, Petitioner

v.

Joe Olivez and the State of Alabama, Respondents

Petition For Writ of Certiorari To The United States Fifth Circuit Court of Appeals

Petitioner James Freeman prays that a Writ of Certiorari issue to review the judgement of the United States Fifth Circuit Court of Appeals, entered in the above-entitled case on April 8 1981 and that said judgement be reversed.

"Judgements Below"

The judgements of the Fifth Circuit Court of Appeals and the United States District Court, Northern Distaict of Alabama, are included as an appendix of this petition.

"Jurisdiction"

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (3).

"Question Presented"

Did the lower Courts err in adopting the peculiar letter of the United States Magistrate that - first - altered the specific - fourteenth amendment - claims of the petitioner and thereafter declared said claims to be mere variations of the fifth amendment claim decided adversely to the petitioner in Freeman - v - Davis, et al., CA 78-A-0122-S?

"Constitutional Provisions Involved"

The Fourteenth Amendment of the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the the equal protection of the laws."

The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statement of the Case

Petitioner was found guilty of first degree murder as a result of the ignorance and/or negligence of his defense attorney pertaining to law in relations to the facts of the peti-

tioner's case. Defense counsel's inactions led the petitioner to believe that conspiracy was a lesser included offense of first degree murder. This view, however, was incorrect, as evident by their seperate statues defining the seperate crimes. Homicides, section, 13-1-70, and Conspiracy, section, 13-7-20, code of Alabama, 1975.

The discovery of these essential facts of law was repressed because the petitioner's direct appeal was still pending before the Alabama Court of Criminal Appeals. Approximately twenty-two (22) month had elasped, yet still the petitioner's trial transcript had not been submitted to the appellate court. Soon thereafter, the petitioner filed his first petition for writ of habeas corpus; requesting that the court excuse the exhaustion principle and hear his claims on the merits. Freeman -v- Davis CA 77-A-0267-S. Subsequent to said petition, the trial court filed said transcript with the appellate court and the petition was denied for failure to exhaust state remedies. It should be noted however, that the court considered the petitioner's four claims

of constitutional deprivations to be seperate and distinct from one another, before it granted probable cause to appeal said judgement. — Id.

The petitioner, though reluctant, did not appeal the judgement of the district court. This action was taken because had he done so, he would have forfieted all assistance of the more experience laymen in relations to his case. Another factor being that - due to the naïveté of the petitioner - he was mislead into believing, "that justice would be provided upon any 'valid' request."

The petitioner thereafter, sought justice in the state courts. This method proved to be plain error; for, although his claims were of constitutional propiation, no opinion was ever given by said courts in denying his numerous petitions for relief.

Subsequently, the petitioner filed his second petition for writ of habeas corpus, Freeman-v-Davis, et al., CA 78-A-0122-S; alleging the same four claims that were presented in Freeman-v-Davis, CA 77-A-0267-S.

However, upon the request of the United States Magistrate, the district court elaborated only upon the fifth amendment claim of broadening the indictment; the court surpassed the initial question presented in that claim, i.e., whether conspiracy is a lesser included offense of first degree murder or not, and denied the petition upon the test of fundamental fairness. Freeman-v-Davis, et al., CA 78-A-0122-S.

Though baffled by the decisions of the district and fifth Circuit appeals courts, upon his request for a certificate of probable cause, the petitioner, nevertheless presented his second petition for writ of error in the trial court. Said petition was

denied primarily because the first petition was denied: notwithstanding the fact, that two additional claims of constitutional proportion were presented in said petition. The petitioner, immediately thereafter, instituted his third petition for writ of habeas corpus; alleging that he was denied the Youthful Offender Act, solely because of the change in the indictment, and that his defense attorney was negligent in allowing such a refusal without a protest. These claims are highly essential when considering the facts, that the state never proved nor attempted to prove that the petitioner committed the crime alledged in the indictment." In addition, since the decision of the district's court (Freeman-v-Davis, et al., CA 78-A-0122-S), concerning, "Alabama's Felony Murder Doctrine", is incompatible with Alabama law in relations to conspiracy and first degree murder; the petitioner reiterated the fifth amendment claim and emphasized the failure of his defense attorney to object

to the evidence of a seperate caime not included in the indictment. Nevertheless, the petition was denied and the subsequent attemp to appeal was also denied. Freeman-v- Spears, etc., No. 79-8360; (D.C. No. CA 79-A-0145-S).

Thereafter, the petitioner, again, exhausted all state remedies. Whereupon he then filed his fourth petition for writ of habeas corpus, in the United States District Court, Northern District of Alabama; upon said petition, the petitioner alledged three claims, all of which were derived from his receiving inadequate assistance from his attorney. The district court, through its magistrate, "altered the petitioner's specific claims into general claims", and thereafter, "declared the petitioner's claims as mere variations of the fifth amendment claim decided adversely to him in his second petition for writ of habeas corpus."

Notwithstanding the fact, that this same court declared these same claims seperate and distinct in Freeman-v- Davis, CA 77-A-0267-S; the petition was denied for the foregoing reason, and the petitioner's attemp to appeal was also denied. The final decision being rendered April 8, 1981. Freeman-v- Oliver and the State of Alabama, Re: 80-8607; (D.C. No. CV 80-A-0892-S)

How A Federal Question Is Presented

Petitioner appeals from the denial of the right to be heard, which this Court has held him entitled under the fourteenth amendment of the Federal Constitution.

Reason For Granting The Writ

There is an urgent, ongoing need for constitutionally mandating in the lower Court's, the matter of the accused's right to be heard, when his views, and the law, is in opposition to those held by the United States Magistrate. Surprisingly, nowhere in the district courts decision, which the lower Court adopted, are there any parameters or guidelines indicating when specific claims are to be paraphased into general claims, for the purpose of refusing to hear them. Freeman-v-Oliver, CV 80-A-0892-S, or when major questions should go unanswered, in an effort to defeat justice, Freeman-v-Davis, et al., CA-78-A-0122-S.

So long as this dearth of directive law is allowed to continue persons coming under the authority of hostile U.S. Magistrate's face constitutional pitfalls of not having the district judge consider the claims presented to him and in the manner presented, which

can be remedied by this Court granting this Petition for Writ of Certiorari.

Thus, "in Freeman-v-Davis, et al., CA 78-A-0122-S, the lower Courts elaborated soley upon the issue of indictment broadening. Those Courts held, that since the State of Alabama relied upon the feloney murder doctrine, as enunciated in its statue, section 13-1-70. the admission of conspiracy- though not included in the indictment- was perfectly proper and did not make the petitioner's trial- by Jury- fundamentally unfair."

It was this fallacy, coupled with the altering of the petispecific claims, that has, thus far, determined the fate of his present petition.

Moreover, "nothing in section 13-1-70, gives reference to conspiracy being an element of that statue."

> "Every homicide perpetrated by poison, lying in wait or any kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him

who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind regardless of human life, although without any preconcieved purpose to depaive any particular person of life, is murder in the first degree."

Furthermore, should there remain any doubts about the seperate offenses of conspiracy and first degree murder, section 13-9-20, code of Alabama, 1975, clearly indicates the legislatures intentions, concerning said matters. Behold:

"Any two or more persons conspiring together to commit an assualt on another with the intent to murder, maim, rob, ravish, or to commit the caime against nature, or who attempt to poison any human being or to commit murder by any means not amounting to an assualt, shall each themselves be guilty of a feloney, and shall upon a conviction, be impaisoned in the penitentiary of the state of Alabama for not less than one year and not more than ten years."

Thus, in view of the seperate offenses and seperate penalties for first degree murder and consoiracy. the petitioner's trial by Jury was mere ly a farce and mockery of justice, in that (1) the honorable trial Judge knowingly committed perjury when he declared that, " conspiracy

falls under any of the four items of unlawful homicides," (T. Tr. 251, 252); and (2) the honorable trial Judge deliberately sup- the penalty for conspiracy, knowing that said penalty was high- ly favorable to the petitioner, (Oral Charge); as well as (3) present- ing the Jury with the charge of conspiracy to determine the guilt or innocence of the petitioner. (T. Tr. 244 and 250). and not for pronouncing judgement or to declare punishment thereupon, (T. Tr. 253); thereby coercing the Jury into a finding of guilt and declaration of punishment in relations to first degree murder; and also (4) since the petitioner's defense attorney's inactions clearly indicates that he was not aware of the seperate crimes, seperate penalties, and seperate statues of conspiracy and first degree murder, he could not have rendered reasonably effective assistance. See sections, 13-1-70, and 13-9-20, code of Alabama, 1975.

Thus. (1) the lower Court erred in adopting the recommendation of the United States Magistrate in reguards to the petitioner's fourteenth amendment claim of perjury as being a variation of the fifth amendment claim decided adverse

ly to him in Freeman -v- Davis, et al., CA 78-A-0122-S; when both -fifth and fourteenth amendment- claims were presented together and declared seperate and distinct, by said magistrate, in Freeman -v- Davis, CA 77-A-0267-S.

(2) Most importantly, but without limitations, the lower Court erroed in adopting the recommendation of the United States in reguards to the petitioner's fourteenth amendment claim of suppression of favorable evidence as being a variation of the fifth amendment claim decided adversely to him in Freeman -v- Davis, et al., CA 78-A-0122-S. when both -fifth and fourteenth amendment- claims were presented together and declared seperate and distinct, by said magistrate, in Freeman -v- Davis, CA 77-A-0267-S. Whereas, in Freeman -v- Davis, No. 78-8330. the lower held that under the feloney murder doctrine the charges of conspiracy is proper under an indictment for first degree murder; yet in Freeman -v- Oliver, No. 80-8607, the court has held that the penalty, in relations to conspiracy was inrelevant.

(3) The lower Court erroed in adopting the recom-

mendation of the United States Magistrate in reguards to the petitioner's fourteenth amendment claim of Jury coerc-ing as being a variation of the fifth amendment claim decided adversely to him in Freeman-v-Davis, et al., CA 78-A-0122-S; when both-fifth and fourteenth amendment- claims were presented to-gether and declared seperate and distinct, by said magistrate, in Freeman-v-Davis, CA 77-A-0267-S.

In addition, "this theory of a variation was made pos-sible by the U.S. Magistrate's deliberate alterations of the petition-er's specific claims into general claims."

"Conclusion"

For the above-cited reasons, the petitioner prays that this honorable Court will issue a Wait of Certiorari to the United States Fifth Circuit Court of Appeals and reverse its judgement.

Sworn before me this 18th day of ~~May~~ 1981

R. L. [illegible]

"Notary Public"

James Freeman

"Petitioner"

U.S. COURT OF APPEALS
FILED
APR 8 1981
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-8607

JAMES FREEMAN,

Petitioner,

versus

JOE OLIVER and the STATE OF ALABAMA,

Respondent.

On Application for Certificate of Probable Cause and for Leave to Appeal In Forma Pauperis

---

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

B Y T H E C O U R T :

A member of this panel has heretofore denied petitioner's pro se application for a certificate of probable cause and for leave to appeal in forma pauperis. Upon consideration by this panel upon request of petitioner, IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is DENIED.

Carl

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TELEPHONE INQUIRIES
ALA-GA CASES TEL (404) 221-3836
FLA - CASES TEL (404) 221-3833
FTS PREFIX IS 242

TEL 404-221-6187
FTS-242-6187
56 FORSYTH ST., N.W.
ATLANTA, GEORGIA 30303

December 15, 1980

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 80-8607 - JAMES FREEMAN v. JOE OLIVER and the STATE OF ALABAMA

(D.C. No. CV 80-A-0892-S)

The following action has this day been taken in the above case;

☐ AN EXTENSION OF TIME has been granted to and including

☐ for filing appellant's/petitioner's brief.
☐ for filing appellee's/respondent's brief.
☐ for filing reply brief.
☐ for filing petition for rehearing.

☐ Motion to consolidate granted.
☐ Motion to supplement or correct the record granted.
☐ Motion for leave to file supplemental brief granted.
☐ Motion for leave to file brief amicus curiae is granted.
☐ Joint motion as to time for filing briefs granted.
☒ Order enclosed has been entered.
☐

GILBERT F. GANUCHEAU, Clerk

cc: Mr. James E. Vandegrift, Clerk
Mr. James Freeman, pro se
Mr. Charlie Graddick

BY: L. J. Keener
Deputy Clerk

P.S. to Mr. Vandegrift:
Returned herewith is the one volume of original District Court Papers. Please acknowledge receipt on the enclosed copy of this Memorandum.

ql

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-8607

U.S. COURT OF APPEALS
FILED
DEC 15 1981
GILBERT F. GANUCHEAU
CLERK

JAMES FREEMAN,

Petitioner,

versus

JOE OLIVER and the STATE OF ALABAMA,

Respondent.

- - - - - - - - - - -

On Application for Certification of Probable Cause and for Leave to Appeal In Forma Pauperis

- - - - - - - - - - -

O R D E R :

IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is Denied.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

JAMES FREEMAN,	]	
Petitioner	]	
-Vs-	]	NO. CA 77-A-0267-S
J. O. DAVIS, Warden, Fountain Correctional Center,	]	
Respondent	]	

O R D E R

The Court has considered the habeas corpus petition filed by James Freeman, the response to a show cause order from the State of Alabama and a report and recommendation of the U. S. Magistrate. It is the Court's opinion that the recommendations of the magistrate be ADOPTED and APPROVED.

It is therefore ORDERED, for the reasons stated in the report that the petition be and it hereby is DISMISSED for failure to exhaust state remedies. However, should the petitioner wish to obtain appellate review of this Court's decision, a certificate of appeal is hereby GRANTED.

The Clerk is directed to furnish petitioner and the Honorable William Baxley, Attorney General of the State of Alabama with a copy of this Order.

DONE, this 27th day of May, 1977.

UNITED STATES DISTRICT JUDGE

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

MAY 27 1977

JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY: Dale W Marsh

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

JAMES FREEMAN,	]	
Petitioner	]	
-Vs-	]	NO. CA 79-A-0145-S
LARRY SPEARS, Warden, Staton Correctional Center; STATE OF ALABAMA,	]	
Respondents	]	

J U D G M E N T

In accord with the report and recommendation heretofore filed by the magistrate, objections thereto having been considered, it is hereby

ORDERED, ADJUDGED and DECREED that the motion to proceed in forma pauperis be GRANTED. It is further ORDERED, ADJUDGED and DECREED that the petition for habeas corpus be and the same hereby is DENIED.

DONE, this ____ day of February, 1979.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
FEB 23 1979
JAMES L. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY:

JAMES FREEMAN,	]	
Petitioner	]	
-Vs-	]	NO. CA 79-A-0145-S
LARRY SPEARS, Warden, Staton Correctional Center; STATE OF ALABAMA,	]	
Respondents	]	

EXAMINATION, REPORT AND RECOMMENDATION

This is a petition for writ of habeas corpus by a person in custody pursuant to a judgment of a court of the State of Alabama. Petitioner has moved the Court to proceed in forma pauperis and has filed the requisite affidavit of indigency which appears to be in all respects to be sufficient.

This is James Freeman's third attempt to gain habeas corpus relief from a sentence of life imprisonment imposed after his conviction on April 24, 1975 for the offense of first degree murder in the Circuit Court of Jefferson County, Alabama. In his first petition (*Freeman v. Davis*, CA 77-A-0267-S) Freeman alleged various constitutional infirmities in his conviction and urged the Court to excuse the exhaustion of state remedies requirement because of an inordinate delay on the part of the State of Alabama in providing him with a transcript of his trial as an indigent. The respondent's return there showed that the trial transcript was filed while the habeas petition was pending, indicating that the state was then prepared to go forward with Freeman's direct appeal from his conviction. Under those circumstances, the Court declined to excuse the exhaustion requirement and dismissed the petition for failure to exhaust state remedies. In his second petition (*Freeman v. Davis, et al.*, CA 78-A-0122-S) Freeman alleged that he was convicted on a charge not contained in the indictment which the grand jury had

returned against him. That petition was considered and denied on the merits. No appeal was taken.

Now, in the present petition, Freeman seeks habeas relief on the following grounds: [1] the Alabama trial judge denied him treatment under the provisions of the Alabama Youthful Offender Act[1] solely because of the nature of the charge against him; [2] his court-appointed counsel was ineffective because he failed to object to the court's refusal to grant youthful offender status; and, [3] the trial judge added a charge not contained in the indictment when he instructed the jury on the law of conspiracy in connection with the charge brought under Alabama's felony murder doctrine.

The petition should be denied. First, the claim that the trial court added a charge not contained in the indictment against Freeman was considered in CA 78-A-0122-S and decided adversely to him. It should not be reconsidered here. Freeman's claim that the trial court denied him youthful offender status based solely upon the nature of the offense charged does not, in the opinion of the magistrate, state a claim of constitutional proportions. Failure of a state trial court to comply with a state procedural rule does not become a constitutional violation unless such failure has the effect of denying to a defendant due process rights. Under Alabama law, a state trial judge is given wide latitude in the exercise of his discretion to determine which defendants should be accorded youthful offender status and may give great weight to the nature of the crime committed. *Watkins v. State*, 357 So.2d 156, Ala.Cr.App. 1977. Freeman's claim that his counsel was ineffective is necessarily foreclosed by the recommended disposition of his claim that the state trial court wrongly denied him youghful offender status. If the trial court was not in error in refusing such status, Freeman's court-appointed counsel could hardly be ineffective for his failure to advance an incorrect position.

---

[1]Section 15-19-1 et seq., Code of Alabama, 1975.

The magistrate is fully cognizant of the apparent failure of Freeman to comply with Rule 9(b) of the fules governing Section 2254 cases. His claims relating to his youthful offender application and the ineffectiveness of his counsel were not raised in any prior habeas corpus petition in this Court. Should he file any objection to this recommendation, such objection should be accompanied by a full and complete explanation of his failure to raise these issues in his previous habeas petitions. Should there be an objection not accompanied by such explanation, the magistrate will recommend to the Court that such objections not be considered.

It is therefore recommended that the motion to proceed in forma pauperis be granted but that the petition for the writ of habeas corpus be denied.

This recommendation is governed by Rule 2(c) of the Rules Governing Jurisdiction and Authority of United States Magistrates in this Court which provides that either party may file specific objections to the magistrate's report in writing within ten (10) days of its date.

The Clerk is directed to furnish the petitioner and the Honorable Charles Graddick, Attorney General of the State of Alabama with a copy of this report and recommendation and the Court's proposed judgment.

DATED, this 23d day of February, 1979.

EDWIN L. NELSON
United States Magistrate

IN THE UNITED STATES DISTRICT COURT FOR THIS IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

MAR 7 1979

JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY: Dale W Mark

JAMES FREEMAN,]

Petitioner]

-Vs-] NO. CA 79-A-0145-S

LARRY SPEARS, Warden, Staton Correctional Center; STATE OF ALABAMA,]

Respondents]

J U D G M E N T

In accord with the report and recommendation heretofore filed by the magistrate, objections thereto having been considered, it is hereby

ORDERED, ADJUDGED and DECREED that the motion to proceed in forma pauperis be GRANTED. It is further ORDERED, ADJUDGED and DECREED that the petition for habeas corpus be and the same hereby is DENIED.

DONE, this 7th day of ~~February~~ March, 1979.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
APR 27 1979
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
By: Linda J. Clark

JAMES FREEMAN,]

Petitioner]

-Vs-] NO. CA 79-A-0145-S

LARRY SPEARS, Warden, Staton Correctional Center; STATE OF ALABAMA,]

Respondent]

OPINION AND ORDER

Heretofore, on March 7, 1979, the Court made and entered an Order denying petitioner's request for habeas corpus relief pursuant to 28 U.S.C. § 2254. Petitioner has now filed a motion for rehearing. The Court has carefully examined the entire file in this matter and the file in Freeman's previous petition (*Freeman v. Davis*, CA 78-A-0122-S). The Court has given particular attention to the motion for rehearing. The Court is convinced that the original Order in this case was and is correct. Petitioner has presented nothing which has not been previously considered.

In his recommendation dated February 23, 1979 in this case, the magistrate indicated that Freeman did not appeal from the denial of his first petition. That assertion was incorrect. In fact, Freeman filed a notice of appeal and a request for a certificate of probable cause. That request was denied in this Court. A single judge and a panel of the United States Court of Appeals for the Fifth Circuit each denied his request for a certificate of probable cause. The issue raised in that previous petition was the same as the issue raised here upon which Freeman seems to place the greatest reliance. The Court reiterates that the issue having been once considered here, it will not be relitigated.

For the reasons set out herein, the motion for reconsideration should be and the same hereby is denied.

The Clerk is directed to furnish petitioner and the Honorable Charles Graddick, Attorney General of the State of Alabama with a copy of this opinion and order.

DONE, this 27th day of April, 1979.

SENIOR UNITED STATES DISTRICT JUDGE

FILED
1980
U.S. DISTRICT COURT
N.D. DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES FREEMAN,]
]
Petitioner,]
]
vs.] NO. CV 80-A-0892-S
]
JOE OLIVER and the STATE OF ALABAMA,]
]
Respondents.]

ENTERED
dcm
1980

EXAMINATION, REPORT AND RECOMMENDATION

This is the fourth petition for writ of habeas corpus filed by the petitioner, James Freeman, seeking relief from a sentence of life imprisonment imposed after his conviction on April 24, 1975, for the offense of first degree murder in the Circuit Court of Jefferson County, Alabama. "In his first petition (*Freeman v. Davis*, CA 77-A-0267-S), Freeman alleged various constitutional infirmities" and urged the court to excuse the exhaustion of state remedies requirement because of an inordinate delay on the part of the State of Alabama in providing him with a transcript of his trial as an indigent. The transcript was filed while the habeas petition was pending. The petition was dismissed for failure to exhaust. Freeman's second petition (*Freeman v. Davis, et al.*, CA 78-A-0122-S) alleged that he was convicted on a charge not contained in the indictment when the trial judge instructed the jury on the felony murder doctrine and used the word "conspriacy" on several occasions. That petition was denied on the merits. Both this court and the United States Court of Appeals for the Fifth Circuit denied his request for a certificate of probable cause. Thus no appeal was taken. In his third petition (*Freeman v. Spears*, CA 79-A-0145-S), Freeman reiterated the claim that a conspiracy charge was added to the indictment and also alleged that the trial court violated his rights by not treating him as a youthful offender[1] and that his attorney was constitutionally inadequate because of his failure to insist upon such treatment. In that petition the court

[1]Section 15-19-1 et seq., Code of Alabama 1975.

refused to hear for a second time the claim that the trial court added the conspiracy charge. It considered the claims regarding the youthful offender status on the merits and denied them. "On the present petition, Freeman makes three claims, all of which are merely variations of the claim that the trial court charged him with conspiracy, though the grand jury had failed to do so." He claims that his counsel was ineffective because (1) he permitted the trial court to perjure himself in giving the "conspiracy" instruction; (2) he permitted the trial court to suppress evidence favorable to Freeman, the favorable evidence being the lesser maximum sentence for conspiracy as opposed to the greater maximum sentence for first degree murder; and, (3) he permitted the court to coerce the jury in some way by talking about conspiracy. As noted, these are all variations of the claim which was decided adversely to Freeman in his second petition. Absent some compelling reason, the court should not expend valuable judicial resources rehearing a claim which has previously been fully considered and decided against the petitioner. Accordingly, it is recommended that the petition be denied.

The petitioner has moved the court to proceed in forma pauperis and has filed the requisite declaration of indigency which is sufficient to require the court to permit him so to proceed.

Either party may file specific written objections to this report within ten (10) days of its date.

The Clerk is directed to serve a copy of this report and recommendation upon the petitioner, James Freeman, and a copy of the report and recommendation along with a copy of the petition for writ of habeas corpus upon the respondents, Joe Oliver and Charles Graddick as Attorney General for the State of Alabama.

DATED this 29th day of July, 1980.

Edwin L. Nelson

EDWIN L. NELSON
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
AUG 25 1980
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

JAMES FREEMAN,]
]
Petitioner,]
]
vs.] NO. CV 80-A-0892-S
]
JOE OLIVER, and THE STATE OF ALABAMA,]
]
Respondents.]

ENTERED
AUG 26 1980

JUDGMENT

In accord with the report and recommendation heretofore filed by the magistrate on July 30, 1980, petitioner's objections thereto having been fully considered, it is hereby ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus be and the same hereby is DENIED.

DATED this 27 day of August, 1980.

CLARENCE W. ALLGOOD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES FREEMAN, Petitioner -VS- J. O. DAVIS, Warden, Fountain Correctional; STATE OF ALABAMA, Respondent	CA NO. 78-A-D122-S

RETURN AND ANSWER
AND IN THE ALTERNATIVE,
MOTION TO DISMISS

Comes now the respondent, by and through its Attorney General, William J. Baxley, and for answer to the Order to Show Cause issued by this Honorable Court on the ninth day of February, 1978, states that petitioner is incarcerated without any violation of any constitutional rights and pursuant to a valid judgment of conviction by the Circuit Court of Jefferson County, Alabama. In support thereof, respondent submits the following exhibits and motions:

I.

EXHIBITS

The following exhibits are offered by the respondent in support of this response and are attached hereto and made a part hereof:

A. Exhibit "A" is a certified copy of the minute entry.

B. Exhibit "B" is a certified copy of the trial docket sheet.

II.

ANSWER

For answer to the Order to Show Cause, respondent shows the following:

1. The writ fails to state a claim showing any constitutional violation.

2. The writ fails to state a claim showing any issue cognizable by federal habeas corpus.

3. Petitioner has appealed to the Court of Criminal Appeals of Alabama. That court affirmed the decision of the Circuit Court of Jefferson County, Alabama (See Exhibit "B"). Mr. Freeman's application for rehearing was denied.

4. Petitioner sought relief through writ of error coram nobis. That relief was denied. Petitioner appealed and the decision of the lower court was affirmed (See Exhibit "B").

5. It appears to respondent that petitioner has based this petition for writ of habeas corpus on the mistaken belief that it was error for the trial court to charge the jury on conspiracy when conspiracy was not specifically charged in the indictment.

6. Respondent contends that the trial judge did not err by charging on conspiracy. See Wallace v. State, 52 Ala. App. 331, 292 So. 2d 140 (1974); Johnson v. State, 52 Ala. App. 277, 291 So. 2d 369 (1974).

7. A review of the original trial transcript reveals that petitioner failed to object to the court's charges to the jury. Therefore, petitioner's objections came too late.

III.

MOTION TO DISMISS
AND IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT

Respondent respectfully prays this Honorable Court to dismiss the petition on the following grounds:

1. The writ fails to state a claim showing any constitutional violation.

2. The writ fails to state a claim showing any issue cognizable by federal habeas corpus.

WHEREFORE, PREMISES CONSIDERED, respondent requests that the court determine that good and sufficient cause has been shown why the petition should be denied, and in the alternative, requests that it be dismissed.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL

BARRY V. HUTNER
ASSISTANT ATTORNEY GENERAL

1327 City Federal Bldg.
Birmingham, Al.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Return of Respondent upon petitioner, James Freeman, % Fountain Correctional Center, Rt. 2, Box 37, Atmore, Alabama, 36502, by placing a copy of same in the U. S. Mail, postage prepaid, and properly addressed to him as indicated on this the 21st day of February, 1978.

Barry V. Hutner

BARRY V. HUTNER
ASSISTANT ATTORNEY GENERAL

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

September 28, 1978

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 78-8330 - JAMES FREEMAN vs. J. O. DAVIS, ETC., ET AL.

(District Court Docket No. 78-A-0122-S)

The following action has this day been taken in the above case:

( ) Motion to proceed on the original record granted.

( ) Motion to proceed on the original record and typewritten brief granted.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Motion for leave to file brief in preliminary typewritten form is granted.

( ) Joint motion as to time for filing briefs granted.

(XXX) Order enclosed has been entered.

( )

cc: Mr. James Freeman
Mr. Barry V. Hunter
Mr. James E. Vandegrift, Clerk

P.S. to Clerk: Returned herewith are your original papers. Please acknowledge receipt.

EDWARD W. WADSWORTH, Clerk

By Julie DeLee
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-8330

U.S. COURT OF APPEALS
FILED
SEP 28 '78
EDWARD W. WADSWORTH
CLERK

JAMES FREEMAN,

Petitioner,

versus

J. O. DAVIS, Etc., ET AL.,

Respondents.

- - - - -

On Application for Certificate of Probable Cause,
Leave to Appeal In Forma Pauperis
and for Appointment of Counsel

- - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is DENIED

IT IS FURTHER ORDERED that petitioner's pro se application for appointment of counsel to represent him in this cause is DENIED

Jas. P. Coleman
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

November 6, 1978

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 78-8330 - JAMES FREEMAN -vs- J. O. DAVIS, ETC., ET AL.

(District Court Docket No. CA-78-A-0122-S)

The following action has this day been taken in the above case:

( ) Motion to proceed on the original record granted.

( ) Motion to proceed on the original record and typewritten brief granted.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Motion for leave to file brief in preliminary typewritten form is granted.

( ) Joint motion as to time for filing briefs granted.

(X) Order enclosed has been entered.

( )

cc: Mr. James Freeman
Mr. Barry V. Hunter
Mr. James E. Vandegrift, Clerk

EDWARD W. WADSWORTH, Clerk

By Julie Dolese
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV 6 '78
EDWARD W. WADSWORTH
CLERK

No. 78-8330

JAMES FREEMAN,

Petitioner,

versus

J. O. DAVIS, Warden, Fountain Correctional Center, ET AL.,

Respondents.

- - - - -

On Application for Certificate of Probable Cause, Leave to Appeal In Forma Pauperis and for Appointment of Counsel

- - - - -

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

BY THE COURT:

A member of this panel has heretofore denied petitioner's pro se application for certificate of probable cause, leave to appeal in forma pauperis and motion for appointment of counsel. Upon consideration by this panel upon request of petitioner, IT IS ORDERED that petitioner's pro se application for certificate of probable cause, leave to appeal in forma pauperis and for appointment of counsel is DENIED

J.P.C.

United States Court of Appeals
FIFTH CIRCUIT

OFFICE OF THE CLERK

800 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

CLERK

SEPTEMBER 4, 1979

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 79-8360 - James Freeman -vs- Larry Spears, etc.

(Dist. Ct. No. CA-79-A0145-S)

The following action has this day been taken in the above case:

( ) Motion to proceed on the original record granted.

( ) Motion to proceed on the original record and typewritten brief granted.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Motion for leave to file brief in preliminary typewritten form is granted.

( ) Joint motion as to time for filing briefs granted.

(XX) Order enclosed has been entered.

( )

cc: Mr. James Freeman ✓
Mr. Charles Graddick
Mr. James E. Vandegrift, Clerk

CLERK, U. S. COURT OF APPEALS

By Claudia Rudia
Deputy Clerk

P.S. to Clerk: Returned herewith are your original papers. Please acknowledge receipt.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-8360

U. S. COURT OF APPEALS
FILED
SEP 4 1979
CLERK

JAMES FREEMAN,

Petitioner,

versus

LARRY SPEARS, Warden,
Station Correctional Center
State of Alabama,

Respondent.

- - - - -

On Application for Certificate of Probable Cause
and for Leave to Appeal in Forma Pauperis

- - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is DENIED

Jas. P. Coleman
UNITED STATES CIRCUIT JUDGE